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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

MC ALLEN GRACE BRETHREN
CHURCH, et al.,

Plaintiffs,

v.

United States Attorney
General, Alberto Gonzales, et
al.,

Defendants.

No. 07-CV-060

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, TO STAY PENDING
THE RESOLUTION OF PARALLEL
CRIMINAL PROCEEDING**

Defs' Reply in Support
of Motion to Dismiss

Case No. CV 07-060

1 As explained in Federal Defendants' Motion to Dismiss,
2 Plaintiffs' Complaint must be dismissed pursuant to Heck v.
3 Humphrey, 512 U.S. 477 (1994), because this action necessarily
4 challenges the validity of an ongoing criminal proceeding. In
5 the alternative, Defendants moved to stay this action pending the
6 resolution of criminal proceedings in United States of America v.
7 Cleveland, 06-MJ-04806 (S.D. Tex.). For the reasons set forth in
8 Defendants' Motion to Dismiss and in this reply, the Court should
9 dismiss Plaintiffs' Complaint in its entirety.

10 In their Response, Plaintiffs have: (1) stated (without
11 explanation or supporting legal authority) that they "resist"
12 Defendants' Motion to Dismiss; (2) agreed to stay proceedings
13 pending the resolution of Mr. Cleveland's criminal case; (3)
14 agreed to remove Mr. Cleveland from this suit "as long as [he]
15 can rejoin Plaintiffs later"; and (4) asked for a temporary
16 injunction preventing the "seizure of feathers at American Indian
17 Powwows." See Plaintiffs' Response ("Resp."), Docket No. 6.

18 Importantly, Plaintiffs have failed to respond to the
19 following arguments: (1) that the Court lacks jurisdiction over
20 Plaintiffs' claims regarding eagle feathers due to Plaintiffs'
21 failure to exhaust administrative remedies; and (2) that
22 Plaintiffs have named improper parties as Defendants in this suit
23 and that, if this case is allowed to proceed, the United States
24 Department of the Interior and the United States Fish and
25 Wildlife Service ("FWS") should be substituted as the only named
26 Defendants. Because Plaintiffs have not responded to these
27

arguments, they should be deemed conceded. See 4-County Elec. Power Ass'n v. TVA, 930 F. Supp. 1132, 1143 (S.D. Miss. 1996) ("Plaintiff made no response to that aspect of TVA's motion and thus has apparently conceded TVA's motion with respect to that claim."); Rascon v. Austin I.S.D., No. A-05-CA-1072 LY, 2006 WL 2045733, *4 n.3 (W.D. Tex. July 18, 2006) ("It is noteworthy that Plaintiff has not responded to these arguments and thereby appears to have conceded them.")

This Action Must Be Dismissed.

Despite Plaintiffs' resistance, this action must be dismissed in its entirety. In their response, Plaintiffs have failed to articulate any rationale or cite any legal authority explaining why this case should not be dismissed. Resp. at 1-2. This is for good reason -- dismissal is clearly mandated by Heck v. Humphrey and its progeny. The fact that Plaintiffs have agreed to remove Michael Cleveland as a Plaintiff (at least temporarily) does not change the outcome.

Even without the participation of Mr. Cleveland, the remaining Plaintiffs cannot proceed with this action without violating the doctrine set forth in Heck v. Humphrey. In their response, Plaintiffs have not disputed that the encompassing premises of their claims are (1) that Defendants have erred in interpreting the laws prohibiting the possession of certain feathers (e.g., the Migratory Bird Treaty Act) as applying to American Indians who are not registered members of federally

1 recognized tribes and (2) that a FWS Agent's actions on March 11,
2 2006, violated Plaintiffs' Constitutional rights. These legal
3 questions -- and the underlying facts giving rise to them -- are
4 the exact issues before the court in United States of America v.
5 Cleveland and this suit must therefore be dismissed pursuant to
6 Heck.

7 A recent Fifth Circuit decision, handed down after the
8 filing of Defendants' Motion to Dismiss, is instructive on this
9 point. In Deleon v. City of Corpus Christi, --- F.3d ---, 2007
10 WL 1560082 (5th Cir. 2007), the Fifth Circuit held that Heck v.
11 Humphrey applies with full force to deferred adjudications. In
12 making this holding, Judge Higginbotham discussed Heck in detail
13 and noted that its application

14 avoids parallel litigation over the issues of probable
15 cause and guilt ... and it precludes the possibility of
16 the claimant [] succeeding in the tort action after
17 having been convicted in the underlying criminal
18 prosecution, in contravention of a strong judicial
19 policy against the creation of two conflicting
20 resolutions arising out of the same or identical
21 transaction.

22 DeLeon, 2007 WL 1560082 at *4 (quoting 8 S. Speiser, C. Krause, &
23 A. Gans, American Law of Torts § 28:5, p.24 (1991)).

24 The Fifth Circuit went on to hold that the Deleon plaintiff
25 could not proceed with an excessive force claim even though he
26 argued that such a claim did not call into question the validity
27 of his criminal conviction/deferred adjudication. DeLeon, 2007 WL
1560082 at *6. The court noted that all of Deleon's claims in
the civil suit were based upon a "single violent encounter

1 throughout which [the police officer allegedly] used excessive
2 force." Id. Thus, because the suit squarely challenged the
3 factual determinations underlying his conviction, even claims
4 that purportedly did not directly challenge the legality of his
5 arrest were held to be "inseparable" and barred by Heck. Id.

6 Similarly, here, many of Plaintiffs' claims -- regardless of
7 which Plaintiffs are advancing them -- are "inseparable" from Mr.
8 Cleveland's criminal case and success by any of the Plaintiffs
9 here would run the risks of "two conflicting resolutions arising
10 out of the same [] transaction," Deleon, at *4. As discussed in
11 Defendants' Motion to Dismiss, the legal claims asserted in this
12 civil suit also have been asserted as defenses to the criminal
13 prosecution in United States v. Cleveland. See generally Appeal
14 Brief, Exhibit 3 to Defendants' Motion to Dismiss, Docket No. 5.
15 Further, it is unquestionable that the facts underlying Mr.
16 Cleveland's criminal conviction are also the basis for the
17 instant action. Compare Exhibit 3 with Complaint at pp. 10-23
18 (factual allegations taken directly from the appeal brief filed
19 in United States v. Cleveland). Thus, several, if not all, of
20 the claims at issue in this case are "inseparable" from the facts
21 and legal rulings supporting Mr. Cleveland's criminal conviction
22 -- regardless of which Plaintiffs are actually asserting them.
23 Accordingly, this suit must be dismissed in its entirety, even if
24 Mr. Cleveland temporarily withdraws from the case.

1 **Plaintiffs' Request for an Injunction Should Be Denied.**

2 In their response, Plaintiffs have requested that the Court
3 issue an injunction prohibiting the Government from seizing
4 feathers at American Indian Powwows, pending the outcome of this
5 case. Resp. at 1. This is a request for a preliminary
6 injunction, which the Court need not address if it dismisses this
7 case pursuant to Heck. Assuming that the Court does address the
8 issue, Plaintiffs' request must be denied because they have
9 failed to make the showings necessary to establish entitlement to
10 a preliminary injunction.

11 A movant seeking a preliminary injunction must establish
12 four factors: "(1) a substantial likelihood of success on the
13 merits, (2) a substantial threat that failure to grant the
14 injunction will result in irreparable injury, (3) the threatened
15 injury outweighs any damage that the injunction may cause the
16 opposing party, and (4) the injunction will not disserve the
17 public interest." Lakedreams v. Taylor, 932 F.2d 1103, 1107 (5th
18 Cir. 1991) (citations omitted). Because a preliminary injunction
19 is an extraordinary and drastic remedy, the movant must carry his
20 burden of persuasion "by a clear showing." Mazurek v. Armstrong,
21 520 U.S. 968, 972 (1997) (citation omitted). Conclusory
22 allegations are not sufficient to support a request for a
23 preliminary injunction; instead, strict proof of each element is
24 required before a preliminary injunction may issue. See Plains
25 Cotton Co-op. Ass'n of Lubbock v. Goodpasture Computer Servs.,
26 807 F.2d 1256, 1261 (5th Cir. 1987). In the instant case,

1 Plaintiffs' unsworn statements fail to address, much less clearly
 2 prove, the four required factors and their request for
 3 preliminary relief must therefore be denied.^{1/}

4 For all the reasons discussed above, Defendants respectfully
 5 request that the Court grant Defendants' Motion to Dismiss. As
 6 the Fifth Circuit recently held, "[a] preferred order of
 7 dismissal in Heck cases decrees, Plaintiffs claims are dismissed
 8 with prejudice to their being asserted again until the Heck
 9 conditions are met." DeLeon, at *6 (internal quotations
 10 omitted). A similar order dismissing Plaintiffs' claims with
 11 prejudice should be entered here.

12 DATED: June 11, 2007

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24 ^{1/} Further, Plaintiffs' requested injunctive relief is not
 25 available because it would violate constitutional separation of
 26 powers by requiring the Court to prospectively bar the Executive
 27 Branch from exercising its prosecutorial discretion. See Heckler
v. Chaney, 470 U.S. 821, 831 (1985) (noting that "an agency's
 decision not to prosecute or enforce, whether through civil or
 criminal process, is a decision generally committed to an agency's
 absolute discretion"); United States v. Cox, 342 F.2d 167, 171 (5th
 Cir. 1965) ("It follows, as an incident of the constitutional
 separation of powers, that the courts are not to interfere with the
 free exercise of the discretionary powers of the attorneys of the
 United States in their control over criminal prosecutions").

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2007, I served a copy of the foregoing via the District's Electronic Case Filing System, on the following:

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